

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD REGION 10**

**MERCEDES-BENZ U.S. INTERNATIONAL,  
INC. (MBUSI)**

**and**

**Case 10-CA-169466**

**KIRK GARNER, An Individual**

**MAU WORKFORCE SOLUTIONS &  
MERCEDES-BENZ VANS, LLC, AS  
JOINT AND SINGLE EMPLOYERS**

**and**

**Cases 10-CA-197031  
10-CA-201799**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA**

**MERCEDES-BENZ VANS, LLC AND MAU WORKFORCE SOLUTIONS' REPLY  
TO GENERAL COUNSEL'S OPPOSITION TO MOTION TO SEVER AND  
REQUEST FOR EXPEDITED HEARING**

Mercedes-Benz Vans, LLC ("MBV") and MAU Workforce Solutions ("MAU") file this Reply to Counsel for the General Counsel's ("General Counsel") Opposition to Respondent's Motion to Sever and Request for Expedited Hearing. In support, MBV and MAU state as follows:

**I. Background**

On September 25, 2017, just days before the October 3, 2017, hearing, the Regional Director ordered consolidation of the above cases despite that the cases involve different entities, facilities, allegations and rules. MBV and MAU did not receive the order until on or around September 27, 2017, and immediately filed a Motion to Sever and Request for Expedited Hearing. On September 29, 2017, General Counsel filed an Opposition to the Motion

("Opposition"). The Opposition did not address, let alone refute, MBV and MAU's arguments in its Motion to Sever. Rather, the Opposition contained an attachment called "Clarification of Order." (Opposition, Exhibit A). The Regional Director had (unbeknownst to MBV and MAU) apparently issued on September 28, 2017, a Clarification of Order which *again* changed the status of these proceedings. Neither Mercedes-Benz U.S. International, Inc. ("MBUSI"), MAU nor MBV had been served the Clarification of Order, despite that they are signed up for e-service. They also had not received a courtesy copy by e-mail or otherwise. The Opposition stated the Clarification of Order's purpose was to make clear "*the cases have been consolidated only to the extent that the same Administrative Law Judge will hear both cases.*" (Opposition, pg. 1).

A few hours later, on September 29, 2017, Administrative Law Judge ("ALJ") Dawson issued an "Order Denying Request for Expedited Hearing" stating on page 1 that "since the Division of Judges had already granted the Region's request to assign both cases to one ALJ, the [clarification of the] Order was unnecessary." Neither MBUSI, MAU nor MBV had been served or received any indication that the Regional Director had requested that ALJ Dawson hear both cases. It is unclear what reasons the Regional Director gave for making his request, as the other parties were not privy to the communications. ALJ Dawson's order did not rule on whether consolidation was proper or not.

## **II. Discussion**

These last minute changes to the scope and consolidation status of these proceedings have created confusion and unnecessary expense. The changes work a prejudice on MBV, MAU and MBUSI who are trying to determine their substantive rights in what has become a moving

target just days before a hearing. More fundamental, these last minute confusing actions suggest the true purpose is "***judge shopping.***" Judge shopping is not a valid ground for consolidation.

The administrative law judge is designated by the Chief Judge or Deputy or Associate Chief Judge in the appropriate office, "as the case may be." *NLRB Rules and Regulations*, Sec. 102.34. The designation "is a matter for administrative determination by the Board with which the parties have no concern." East Texas Steel Castings Co., 116 NLRB 1336, 1337 (1956), *enfd.* 255 F.2d 284 (5th Cir. 1958); NLRB Bench Book, 2-2-100. Here, the ALJ assigned to these cases seemingly has become a great "concern" to the Regional Director. Indeed, the Opposition even states the purpose the Regional Director consolidated the cases was exclusively so that the "*same Administrative Law Judge will hear both cases,*" and ALJ Dawson's order notes the Regional Director "requested" that both cases be assigned to one ALJ. The Regional Director has, apparently, found an ALJ he favors and wants the ALJ to hear two completely separate cases involving different entities, facilities, allegations, and rules.

Nowhere in the Regional Director's delegation of authority is he tasked with selecting or influencing the ALJs that will hear cases he is prosecuting.<sup>1</sup> The conflict of doing so is self-apparent. Board precedent also mandates that parties should not influence the selection of ALJs. Id. More importantly, judge shopping would not be a valid basis for consolidation. Judge shopping by *private litigants* is "universally condemned" by the courts because it tends to undermine public confidence in the judicial system and suggests that justice is not impartial.<sup>2</sup> If

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<sup>1</sup> NLRB, National Labor Relations Board Organization and Functions, Part 201 Description of Organization, Subpart A Description of Central Organization, Sec. 203.1 Regional Directors, last visited September 14, 2017, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/organdfunctions.pdf>; see also 29 U.S.C.A. § 154 ("[t]he Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties.") (emphasis added).

<sup>2</sup> Dinardo v. Palm Beach Cnty. Circuit Court Judge, 199 Fed.Appx. 731, 736 (11th Cir. 2006) (noting the "universally condemned practice of 'judge shopping'"); Disability Advocates & Counseling Grp., Inc. v.

it is not proper for self-interested litigants to judge shop, it clearly cannot be proper for a government official tasked with substantive enforcement of the National Labor Relations Act in Region 10 to manipulate ALJ case assignments in his cases through consolidation. There is no Board precedent holding “judge shopping” is a valid exercise of the Regional Director’s consolidation discretion, and the Opposition, not surprisingly, cites none. Indeed, under the Regional Director’s argument that consolidation is proper to avoid “possibly conflicting rulings,” every case, no matter how different, involving an alleged similar rule could be consolidated *if the Regional Director preferred the ALJ assigned to one of the cases*. The argument also ignores that, as set out in MBV/MAU's Motion to Sever, an employer’s justification for a camera usage restriction requires an individual analysis of that employer’s business justifications. Here, each party will present different witnesses, theories, and defenses and there is no risk of “conflicting rulings.”

At best, these last minutes acts to consolidate wholly separate proceedings appears to be gamesmanship for tactical advantage. As such, consolidation violates the explicit purpose of the Regional Director’s power to consolidate because it does not “effectuate the purposes of the Act” (seemingly manipulating ALJ assignments for strategic gain undermines public confidence in the NLRB and suggests that justice is not impartial) nor avoid “unnecessary costs or delay” (indeed, it actually increases costs and delay as set out in MBV/MAU's Motions to Sever). The conduct also violates the spirit of the rule. The Regional Director’s consolidation is improper, and severance is appropriate.

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Betancourt, 379 F. Supp. 2d 1343, 1344 (S.D. Fla. 2005) (same); United States v. Phillips, 59 F.Supp.2d 1178, 1180 (D.Utah 1999) (collecting cases and scholarly literature indicating that manipulation of the random case assignment process is universally condemned as a disruption of the integrity of the judicial system that would undermine public confidence in the assignment process).

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 2<sup>nd</sup> day of October, 2017:

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